Filed 11/30/16 P. v. Guadagni CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. EDWARD JOHN GUADAGNI, Defendant and Appellant.	F070362 (Super. Ct. Nos. MF010368A & MF010071A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Michael B. Lewis and John D. Oglesby, Judges.

Melissa Baloian Sahatjian, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Lewis A. Martinez and Amanda D. Cary, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

In February 2013, defendant Edward John Guadagni pleaded no contest to transporting methamphetamine for personal use (Health & Saf. Code,[1] former § 11379, subd. (a), as amended by Stats. 2011, ch. 15, § 174). The trial court suspended imposition of defendant's sentence and placed him on probation under the Substance Abuse and Crime Prevention Act of 2000 (Proposition 36), a drug diversion program. Effective January 1, 2014, the Legislature amended former section 11379 to define "transports" to mean "to transport for sale," excluding from the statute those who transport a controlled substance for personal use. (Stats. 2013, ch. 504, § 2.) In August 2014, defendant admitted violating his probation in the instant case and in another case. He was sentenced to a term of three years in prison, and a term of two years to be served concurrently.

Defendant raises the following claims on appeal: (1) he is entitled to retroactive application of amended section 11379 because his judgment of conviction was not yet final when the statute was amended; (2) there is an inadequate factual basis to support his plea; (3) the trial court erroneously sentenced him for being under the influence of a controlled substance (§ 11550) because the People agreed to dismiss this charge pursuant to defendant's plea agreement.

We agree defendant is entitled to application of amended section 11379 and will reverse this count. We also conclude there is a sufficient factual basis to support defendant's plea. Finally, we agree defendant's conviction for being under the influence of a controlled substance must also be reversed, as the People agreed to dismiss this count pursuant to the plea agreement. We will, therefore, remand this matter back to the trial court with instructions to reverse defendant's convictions and for further proceedings consistent with this opinion.

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[1] All undefined statutory references are to the Health and Safety Code unless otherwise indicated.

FACTUAL AND PROCEDURAL HISTORY

Case No. MF010071A

On May 13, 2012, defendant was arrested after officers conducted a probation search of defendant's bedroom and found a syringe containing a clear liquid suspected to be methamphetamine.

On May 25, 2012, defendant pleaded no contest to possession of methamphetamine (§ 11377, subd. (a)), and he admitted one prior strike (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). In exchange for his plea, the trial court suspended imposition of defendant's sentence and placed him on formal probation under Proposition 36.

Case No. MF010368A

On January 7, 2013, officers conducted a probation search of defendant's vehicle and found a white crystalline substance inside of a plastic bag and suspected the substance to be methamphetamine. Because defendant also displayed symptoms consistent with methamphetamine use, officers believed defendant was under the influence of a stimulant. Defendant was placed under arrest.

On January 9, 2013, the trial court revoked defendant's probation in case No. MF010071A. On this same day, in case No. MF010368A, defendant was charged with transportation of methamphetamine (former § 11379, subd. (a); count 1), and being under the influence of a controlled substance (§ 11550, subd. (a); count 2).

On February 13, 2013, defendant pleaded no contest to count 1 in case No. MF010368A and admitted one prior strike conviction. In exchange, the People dismissed count 2. The trial court suspended defendant's sentence and placed him on Proposition 36 probation for three years. Defendant also admitted he violated his probation in case No. MF010071A, and the trial court reinstated his probation in that case under the same terms and conditions previously imposed.

Defendant's probation violations and sentencing

On March 13, 2013, defendant admitted violations of his probation in case Nos. MF010071A and MF010368A. The court reinstated probation in both cases.

On April 3, 2013, defendant's probation was revoked and a warrant was issued for his arrest after he failed to submit to a drug test.

On August 21, 2014, defendant admitted violations of his probation in both cases. In case No. MF010368A, defendant was sentenced to three years in prison. In case No. MF010071A, defendant was sentenced to two years in prison, to run concurrent with his sentence in case No. MF010368A. The trial court struck defendant's prior strike "for all purposes." Although count 2 in case No. MF010368A was to be dismissed pursuant to the parties' plea agreement, the trial court imposed a sentence of one year in jail with one-year credit for time served for this offense.

Defendant filed a timely notice of appeal.

ANALYSIS

I. Defendant Is Entitled to Retroactive Application of Amended Section 11379

In his first claim on appeal, defendant contends his conviction for transportation of methamphetamine must be reversed because (1) his sentence was not final at the time amended section 11379 took effect; and (2) the stipulated factual basis was insufficient to support his plea. We conclude defendant is entitled to application of amended section 11379. Because the trial court suspended imposition of defendant's sentence and granted him probation, his judgment was not final when former section 11379 was amended, and he is entitled to have his conviction vacated. (See *People v. Eagle* (2016) 246 Cal.App.4th 275 (*Eagle*).)

At the time defendant was arrested and convicted of violating former section 11379, the statute provided the following, in relevant part:

> "[E]very person who transports … any controlled substance … unless upon the prescription of a physician … shall be punished by imprisonment … for a period of two, three, or four years."

Courts interpreted the term "transports" to include the transportation of a controlled substance for personal use. (*People v. Eastman* (1993) 13 Cal.App.4th 668, 673–674; *People v. Rogers* (1971) 5 Cal.3d 129, 134–135.) The Legislature subsequently amended former section 11379 to define "transport" to mean "transport for sale." (Stats. 2013, ch. 504, § 2.) The purpose of the amendment was to make clear that a defendant charged with violating the statute must be in possession of drugs with the intent to sell. (Assem. Conc. Sen. Amends. to Assem. Bill No. 721 (2013–2014 Reg. Sess.) as amended June 27, 2013, p. 2.) As such, "'[A] person in possession of drugs ONLY for personal use would remain eligible for drug possession charges. However, personal use of drugs would no longer be eligible for a SECOND felony charge for transportation.'" (*Ibid*.) The amendment took effect on January 1, 2014 (see Cal. Const., art. IV, § 8, subd. (c)(1)), before sentence was imposed in defendant's cases on August 21, 2014.

"Generally, 'where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed' if the amended statute takes effect before the judgment of conviction becomes final." (*Eagle, supra*, 246 Cal.App.4th at p. 279.) Defendant contends he is entitled to retroactive application of amended section 11379 because his sentence was not yet final when the amendment took effect. In a supplemental brief, the People agree. We agree as well. As a result, we must reverse defendant's conviction for felony transportation of a controlled substance—there is no indication from the limited record before us that defendant transported methamphetamine with the intent to sell, rather than for personal use.

II. There Is a Sufficient Factual Basis to Support Defendant's Plea Agreement

Defendant also challenges the factual basis supporting his plea. He contends he intended to plead only to simple possession (§ 11377) but instead he pleaded no contest to a more serious charge, felony transportation. Defendant's claim is without merit.

Counsel stipulated to a factual basis for defendant's plea based on police reports and defendant's criminal history, and we find no deficiency in the facts supporting the plea. From the police reports, it appears that although defendant's conduct now amounts only to possession of a controlled substance (simple possession), at the time of defendant's plea, his conduct did, in fact, amount to a felony under former section 11379, which criminalized transportation of a controlled substance for personal use. The record supports the conclusion that defendant knowingly and voluntarily pleaded no contest to transportation of a controlled substance, and there is no evidence defendant intended to plead only to simple possession. Indeed, he was never even charged with simple possession in case No. MF010368A. We therefore reject defendant's claim.

III. The People May Proceed on The Original Charges Against Defendant

The parties disagree as to whether the People may file a new complaint reinstating the dismissed charge against defendant and whether they may retry defendant for transportation of methamphetamine with the intent to sell. Defendant pleaded no contest to transportation of methamphetamine in exchange for the dismissal of count 2, being under the influence of methamphetamine. The trial court then struck the enhancement for defendant's prior strike offense for all purposes. We have no authority to reduce defendant's conviction to simple possession because simple possession is not a lesser included offense of transporting a controlled substance. (*Eagle*, *supra*, 246 Cal.App.4th at p. 280.) Thus, as a result of the Legislature's amendment of former section 11379, the sole conviction upon which defendant's plea agreement was based must be reversed.

We invited the parties to submit briefing on whether the People are entitled to any remedy on remand. After considering the parties' arguments, we conclude the People are entitled to proceed on the original charges against defendant. However, if the People elect to proceed on the original charges against defendant and he is convicted, the trial court is prohibited from imposing a greater punishment than what defendant received as a result of his original sentence.

In *Eagle*, the defendant pleaded no contest to transporting methamphetamine (§ 11379, subd. (a)), resisting or obstructing a police officer (Pen. Code, § 148, subd. (a)(1)), and he admitted an enhancement for serving a prior prison term (Pen. Code, § 667.5, subd. (b)). (*Eagle, supra*, 246 Cal.App.4th at p. 278.) The People dismissed a count for possession of methamphetamine (§ 11377, subd. (a)), and an enhancement for a prior drug conviction (§§ 11370.2, subd. (c), 11379, subd. (a)). The trial court suspended imposition of the defendant's sentence, and pursuant to a plea agreement, placed the defendant on probation. After the Legislature amended section 11379 and the electorate passed Proposition 47, the defendant moved to vacate his felony conviction for transporting methamphetamine (§ 11379, subd. (a)), and to replace it with a misdemeanor conviction for possession of methamphetamine (§ 11377, subd. (a)).

The appellate court agreed the defendant's conviction for transporting methamphetamine must be reversed as a result of the Legislature's amendment to section 11379, subdivision (a). However, the court permitted the defendant to be retried because the question of whether the defendant transported methamphetamine for sale was not previously tried since it was not relevant to the charges against the defendant at the time of trial. (*Eagle*, *supra*, 246 Cal.App.4th at p. 280.)

Here, as in *Eagle*, the People did not have the opportunity to prove whether defendant transported methamphetamine with the intent to sell, or whether defendant was under the influence of a controlled substance. Defendant asserts the court in *Eagle* did not permit the original charges to be reinstated against the defendant on remand, but he is incorrect. The appellate court remanded the matter back to the trial court to allow the defendant to withdraw his plea, and the court agreed that "the People should be allowed to proceed on the original charges." (*Eagle*, *supra*, 246 Cal.App.4th at p. 277.)

Defendant further contends *Eagle* is distinguishable because here, unlike *Eagle*, "the record is clear [defendant] possessed the methamphetamine for personal use." While it does not appear defendant possessed methamphetamine for a purpose other than

personal use based on the record before us, because former section 11379, subdivision (a) did not distinguish between transporting a controlled substance for sale or for personal use, this issue was irrelevant when defendant was convicted of violating the statute.[2] "Where, …evidence is not introduced at trial because the law at that time would have rendered it irrelevant, the remand to prove that element is proper and the reviewing court does not treat the issue as one of sufficiency of the evidence." (*People v. Figueroa* (1993) 20 Cal.App.4th 65, 72.)

Here, an intervening act by the Legislature decriminalized the conduct for which defendant was convicted, resulting in the reversal of the only conviction upon which his plea agreement was based. To safeguard the rights of the People, who would otherwise be deprived of the benefit of their bargain as a result of the Legislature's amendment of section 11379, subdivision (a), we conclude the People are entitled to withdraw from the plea agreement and to proceed on the original charges against defendant.

We emphasize that if the People elect to try defendant for transportation of methamphetamine or for being under the influence of a controlled substance and defendant is convicted of either offense, the trial court is prohibited from imposing a greater sentence than that which was originally imposed against defendant. It is well-settled that a defendant cannot be penalized for pursuing a successful appeal by receiving a greater sentence than that which was originally imposed. (*People v. Collins* (1978) 21 Cal.3d 208, 216.) Further, this prohibition "restores to the state the benefits for which it bargained without depriving defendant of the bargain to which he remains entitled." (*Ibid*.) Here, defendant was sentenced to three years in prison for transporting methamphetamine, and although the parties agreed the charge of being under a controlled substance (count 2) would be dismissed pursuant to the plea agreement, the trial court erroneously sentenced defendant to one year in prison with one year for time served.

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[2]We further observe the notation in the change of plea form stating defendant's plea was for "transp. for per. use" does not constitute a stipulation.

Should the People elect to proceed with the original charges against defendant and he is convicted, under no circumstance may his new sentence be greater than his original sentence.

IV. Count 2 in Case No. MF010368A Must Be Reversed

The parties agree defendant's misdemeanor conviction for being under the influence of a controlled substance in case No. MF010368A was dismissed in exchange for defendant's plea of no contest to transportation of a controlled substance and his admission of a prior strike. However, the February 13, 2013, minute order from defendant's plea hearing incorrectly states defendant entered a plea of no contest to count 2. The minute order also omits the fact defendant admitted a prior strike at his plea hearing on this same day.

The reporter's transcript indicates the trial court erroneously sentenced defendant on count 2. On August 21, 2014, the trial court revoked probation in case No. MF010368A and sentenced defendant to three years in prison on count 1, and one year in jail with credit for time served on count 2. The court also struck defendant's prior strike. Because defendant was erroneously sentenced on count 2, the February 13, 2013, minute order must be corrected to make clear count 2 was to be dismissed pursuant to the parties' plea agreement, and the August 21, 2014, minute order must be corrected to show that although a sentence was ultimately imposed on count 2, this conviction is reversed.

DISPOSITION

Defendant's conviction in case No. MF010368A for transporting methamphetamine is reversed and the matter is remanded back to the trial court for further proceedings consistent with this opinion. The People may refile the original charges against defendant. If they elect to do so, the People shall notify defendant of their intent to refile the charges within 30 days after remittitur is issued.

The trial court is further directed to amend the minute order dated February 13, 2013, to reflect the fact defendant's conviction for being under the influence of a controlled substance (count 2) in case No. MF010368A was to be dismissed pursuant to the parties' plea agreement, and to show defendant admitted a prior strike. The trial court is also directed to correct the minute order dated August 21, 2014, to show defendant was sentenced on this count and that defendant's conviction on this count is reversed.

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MCCABE, J.*

WE CONCUR:

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POOCHIGIAN, Acting P.J.

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PEÑA, J.

*Judge of the Merced Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.